UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

AMGLO KEMLITE LABORATORIES, INC.

and **CASE: 13-CA-065271**

BEATA OSSAK, An Individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

electronically filed

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Counsel for the Acting General Counsel takes exception to Administrative Law Judge Arthur J. Amchan's March 22, 2012, Decision and Order because it is contrary to the manifest record evidence which supports finding that Respondent Amglo Kemlite Laboratories violated Section 8(a)(1) of the Act on September 20, 2011,[1] by terminating its workforce of 94 employees in retaliation of their engagement in a plant-wide strike to protest longstanding wage issues and their refusal to comply with orders to cease striking and immediately return to work.[2]

Counsel for the Acting General Counsel submits that the ALJ erred by failing to make specific findings that the Plant Manager's and President's statements and actions on the first day of the strike, which included repeated threats that participation in the strike would lead to termination or would be considered equivalent to resignation constituted independent violations of Section 8(a)(1) of the Act. Respondent's managers clearly believed that the strike would end if they convinced the employees that their actions were futile and would only lead to their termination. The managers told the largely Polish-speaking work force that the owner did not

[1] All subsequent dates refer to 2011, unless otherwise indicated.
[2] In this Brief in Support of Exceptions, the Administrative Law Judge will be referred to as "the ALJ", the National Labor Relations Board will be referred to as the "Board," and Amglo Kemlite Laboratories, Inc. will be referred to as "Respondent." Citations to the ALJ's Decision will be referred to as "ALJD" followed by the specific page(s) and line(s) referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

care as much for his Polish workers as he once had, that there were other facilities that could do the work they performed and that half of them would be gone once the owner found out that they had gone on strike. When the employees refused to return to work until their wage demands were addressed, the managers told them that they should punch out and leave the facility. The employees were also told that they had resigned and that they were fired because they had not returned to work. The managers, having nothing more to say to the employees, left them for the remainder of the day.

Counsel for the Acting General Counsel submits that the evidence presented at the hearing can only lead to the conclusion that on the morning of September 20, the managers' told the employees they were terminated. Accordingly, the ALJ erred when he failed to credit the testimony of employee "Jesse" Kopec that on September 20, he heard the managers tell employees that they were fired. ALJD p. 3, ln 9-15; fn 5. Kopec's testimony is consistent with the other evidence which supports the conclusion that Respondent fired its employees on the first day of their strike, after they failed to comply with repeated orders to cease their strike and return work. Specifically, the managers changed the locks and locked the employees out of the facility so that the employees could not return to work the following day, they told the locked-out employees that they had fired themselves by continuing the strike after being told to return to work, they began to interview and hire new applicants and continued to do so even after they received unconditional offers from their employees, they told employees that attempted to return to work that they had to fill out new job applications in order to be considered for hire, they told employees that they had decided to accelerate the transfer of work to Mexico because of the strike, and they transferred production work that was previously performed by the employees to a facility in Mexico.

Counsel for the Acting General Counsel submits that after the strike ended the Respondent failed to reinstate employees in conformity with its September 20 threat that half of them would be gone once the owner learned about the strike. Making good on its threats and to teach the employees a lesson, the Respondent transferred production work that would have been performed by its Illinois employees to Mexico and it failed to reinstate twenty-two employees that made unconditional offers to return to work. Respondent failed to meet its burden to show that its failure to reinstate the employees was based on non-discriminatory reasons. It should be noted that the ALJ did not credit the testimony of Respondent's President that a discussion concerning the need to lay-off employees had occurred prior to the strike. ALJD p 8, fn 12. More importantly, the documents submitted by the Respondent during the hearing failed to support a need for a lay off as the documents disclosed that Respondent had increased the size of its workforce and the number of overtime hours that the employees worked during the period which began December 2010 and ended in August 2011 just prior to the employees strike. ALJD p. 10, ln 1-8. An increase in the size of a workforce and the number of hours that they work clearly fail to support the need for a layoff. Respondent also failed to present its transfer coordinator as a witness and it conceded that the exhibits pertaining to the number of employees and the number of production hours for production employees at its Mexico facility might not be accurate. ALJD p. 10, ln 9-15. Respondent's failure to provide this crucial information concerning the amount of work transferred or allocated to its Mexico facility, work which could have been performed at the Illinois facility, renders a determination that there was a legitimate basis for any "layoff" extremely suspect and highly unlikely. Simply put, there was no plan to layoff any employees prior to the strike and the Respondent's layoff argument is merely a post hoc contrivance to defend against the evidence showing that the Respondent failed to reinstate

the employees as an object lesson to its employees. Based on the foregoing, the ALJ's conclusion that Respondent did not fire the employees but it instead subjected 22 of its employees to an "accelerated lay-off " because they participated in a strike is plainly wrong. ALJD p. 6, ln 34-38; p. 11, ln 26-28.

Accordingly, this brief is organized into four sections. There are two parts in Section I. The first part of Section I sets forth a factual summary of this case. The second part of Section I addresses the argument that there is overwhelming factual support for concluding that Respondent engaged in threats against the employees who participated in the protected work stoppage. There are also two parts in Section II. The first part of Section II addresses the ALJ's error in not concluding that the employees were terminated on the first day of the strike. The second part of Section II summarizes the multi-factor *Quietflex* analysis used in determining that the employees' in-plant work stoppage remained protected. Section III details how the General Counsel met its *Wright Line* burden in demonstrating Respondent's unlawful transfer of production work. Section IV addresses the necessary corrections to the ALJ's remedy and proposed order against Respondent for unlawfully threatening and terminating its employees and transferring production work to another facility, in retaliation for engaging in protected concerted activity.

I. Respondent Violated Section 8(a)(1) When it Threatened Employees With Reprisals for Engaging in a Protected Work Stoppage.

A. On September 20, 2011, the Employees Initiated a Protected Concerted Strike to Address Dissatisfaction with their Wages.

On the morning of September 20, 2011, Respondent's workforce of approximately 97 employees gathered in the assembly area to collectively address the issue of the company's

longstanding wage freeze with management.[3] (Tr. 30, 81, 124). The employees picked this date, September 20, because they were anticipating a visit from the Respondent's Florida based President, Izabela Christian. (Tr. 32). At around 8:40 a.m., Respondent's entire work force, including employees that Respondent designated as "supervisors" and office employees gathered in the middle of the plant, in the assembly department.[4] At around 9:15 a.m., Plant Manager Czajkowska and Respondent's President Christian arrived at the facility and approached the group of employees. (Tr. 32, 83, 124, 126). Czajkowska immediately admonished the group, in Polish, "What are you doing? Why are you not working? Go back to work." (Tr. 84 and 126). One of the employees spoke up that they had stopped work and gathered together because it had been such a long time since any of them had received any pay increase, and the employees wanted to know when there would be a change. (Tr. 34, 84, 126). Czajkowska loudly replied, there will be no discussion, we cannot do anything, the pay is frozen and nothing is going to change. (Tr. 34, 84, 127). Dziekan, one of the employees that was present, testified that she spoke up at the meeting and pled for an answer as to why the employees could not receive a raise when the production and output from the factory was high. (Tr. 86).

i. Plant Manager Czajkowska unlawfully told the striking employees that they could resign if they did not like it and underscored her threats by brandishing resignation papers.

Czajkowska was visibly upset by the employees' refusal to accept her orders to return to work, and she gave them a final ultimatum to either immediately return to work or to resign and leave the facility. Czajkowska brought resignation forms to the meeting and she threw the papers on a table in front of the employees, stating "just sign the paper and you can go." (GC 5,

[3] In the years that preceded the strike, some of the employees had individually approached Plant Manager Anna Czajkowska to request an increase to their wages, or, at the minimum, to receive information on any prospect as to when an increase would be forthcoming. In each instance, Plant Manager Czajkowska turned a deaf ear to the employees' requests and stated that there was no possibility for a wage increase. (Tr. 29, 79, 122).

[4] There are two main first-shifts, the first beginning at 5:00 a.m. and ending at 1:15 p.m., and the second first shift beginning at 6:30 a.m. and ending at 2:45 p.m.

Tr. 199, 207, 283-284). Other employees confirm Czajkowska's efforts to bully the employees.[5] Employee Kopec testified that as Czajkowska threw the papers on the table, he heard her yell, "Because we didn't want to return to work, we are fired....sign it because we are fired....go away." (Tr. 36). The ALJ did not credit Kopec's testimony that the employees were told they were fired. ALJD p. 3, fn. 5. As more fully explained below, however, Kopec's testimony is consistent with General Counsel's other witness' testimony on all the critical matters pertaining to the threats made that morning. Dziekan states, in her affidavit, that Czajkowska threw the papers on a table where some of the employees were sitting. When Czajkowska threw down the papers she said to sign the cards [referring to the resignation forms], punch out your time cards, and get out of there. (R 3, aff. at 2). Consistent with her affidavit testimony, Dziekan testified that Czajkowska threw the pile of the papers on the table and said to sign it, pack up and go. (Tr. 85). Similarly, employee Ossak testified that Czajkowska yelled, if you're so smart, then sign the [resignation] paper, punch out and go.[6] (Tr. 128).

The employees continued to press their demands for the company to address their wage issues. Ossak testified that for the past ten years employees had been told "... everything must be stopped, frozen and so on. We wanted to hear more from them." (Tr. 106, 161). One of the

[5] Czajkowska was an evasive witness on this issue. Czajkowska admitted that she brought resignation papers to the meeting with her because she did not know what to expect . (Tr. 198-199). Czajkowska at first claimed that she handed one resignation paper to one employee while simultaneously instructing that employee to sign the paper and leave. (Tr. 199). After further questioning, Czajkowska reluctantly acknowledged that she placed the resignation paper on the table and then attempted to minimize the impact of her conduct by claiming that she was addressing only one of the employees that surrounded her. (Tr. 199, 282-284). This claim is inherently implausible as she was surrounded by entire work force and their attention was focused on her at that time. Her effort to soft-pedal this event by stating that she did not know what to expect and insinuating that she brought the resignation papers because she had a basis to believe that the striking employees might be seeking to resign, should not be credited because it is implausible in view of the circumstances. (Tr. 198). The employees were clearly engaged in a work stoppage.

[6] Both Dziekan and Ossak were recalled back to work on Friday, September 30th and they are both currently employed by Respondent. The Board has found that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests....[thus], a witness' status as a current employee may be a significant factor ....." *Flexsteel Industries,* 316 NLRB 745 (1995) enfd. mem. 83 F.3d 419 (5th Cir. 1996). Dziekan and Ossak were served with subpoenas ad testificandum and have nothing to gain by their testimony, which is adverse to their employer's interest given that they have already been reinstated. In fact, the employees' candid testimony only serves to draw attention to themselves because if deemed credible their employer would be held liable for violating Section 8(a)(1).

employees asked Czajkowska and Christian if they could speak to the owner of the company, Jim Hyland. (Tr. 84, 127). Czajkowska responded by threatening that Hyland would tell Czajkowska and Christian to get rid of half of the employees. (Tr. 128). Czajkowska continued to intimidate and threaten the employees telling them, you are not going to do anything, you are not going to threaten Hyland, you are going to lose. (Tr. 128). Christian also told the employees that Hyland does not care about you "Polish" people like he used to. (Tr. 85, 132). Christian asked the employees if they understood the term "globalization" and if the employees knew that the owner has four other companies on different continents. (Tr. 131). Christian then threatened the employees by stating that other companies are moving production to Mexico, it would be so easy for Hyland to make a decision, and it is so strange that you employees don't know what Hyland would do at that point with you. (Tr. 131). All of these statements were credited by the ALJ. ALJD p. 3, ln 5-20.

ii. The employees concertedly put their grievance in writing and delivered it to management.

The striking employees remained in the assembly area after Czajkowska and Christian left. Dziekan testified that all the employees waited in the assembly area for Czajkowska and Christian to return because, "we thought that Anna and Izabela went away to discuss the matter between them and they would come to tell us." (Tr. 88). However, by 11:00 a.m., management had not returned. (Tr. 38). In another effort to present their collective grievances, the employees prepared a statement to furnish to management and the owner. (Tr. 38, 137). The employees selected the two most important demands and thereafter, office employee Marta Cooley, who was participating in the strike, left the assembly area in order to present a typewritten copy of the demands to Czajkowska and Christian. The demands were typed in Polish and were translated into English at the hearing to read as follows:

Strike

> The conditions of ending the strike:
>
> 1) We request actual pay and pay back for every year since the last wage increase in a rate of the inflation rate according to the attachment.
>
> 2) We request written guarantee to receive annual wage increase according to the federal annual inflation.

(GC 3, Tr. 38, 133-135, 137-139, 178-179).

After the written demands were presented to the company managers, the employees continued to wait in the assembly area of the facility for a response. Kopec, Dziekan, and Ossak each testified that no one from management returned to speak to the group of employees. (Tr. 39, 89, 139-140).

Respondent's production "supervisors" continued to participate in the strike and remained with the employees that day. However, one of the supervisors, Krystyna Skomorska left the striking employees in order to carry out some of her work duties that morning. (Tr. 210, GC 9 at 2, lns 22-24). Skomorska also met with Czajkowska and Christian and agreed to act as an intermediary for the two managers. (Tr. 370). Skomorska testified that she returned to the assembly area and in a loud voice asked the supervisors to go to the Quality Control (QC) Department to meet with the managers. (Tr. 369). According to Skomorska employees pled with the supervisors to stay. (Tr. 370). There is no evidence to show that the Respondent's employees threatened the supervisors or attempted to physically prevent them from leaving the group.[7]

[7] Czajkowska offered hearsay testimony in which she described several conversations she had with employees on the first day of the strike in which they informed her that they wanted to return to work but were "afraid" to do so. (Tr. 201). The evidence does not support the claims that employees were afraid to return to work. In particular, contrary to Czajkowska's testimony, Respondent witnesses Skomorska and Wilusz, respectively, returned to work or claimed to have worked on the day of the strike. (Tr. 140, 160-161, GC 9 p 2, lns 21-24, 392-293). Further Czajkowska offered contradictory evidence regarding Skomorska's actions that day. More specifically, after Czajkowska initially testified that Skomorska was among those who was afraid to return to work, she later admits that she and Christian were working with Skomorska that morning. (Tr. 202-203, 204, 210).

Skomorska returned to Czajkowska and Christian to inform them that none of the supervisors were willing to leave the group of striking employees. (Tr. 370).

iii. Plant Manager Czajkowska reaffirms that she had fired the employees by telling the remaining employees that they are fired and directs them to leave.

The majority of the employees remained peacefully assembled in the middle of the plant for the duration of the two overlapping shifts on Tuesday, September 20, waiting for management to respond to their concerns. (Tr. 107, 160). However, some of the employees did leave around 1:15 p.m., the usual ending time for the earlier starting shift.

Prior to leaving the plant that day, the employees agreed to return, as a group, the following morning, at 5:00 a.m. (Tr. 64-65, 108). Dziekan testified that she, like other employees, were confused as to their state of affairs and were returning to the plant on Wednesday morning without a plan but with the hope that management would satisfactorily provide answers to their wage demands. (Tr. 108).

Kopec testified that he did not leave at 2:45 p.m. with the majority of the employees but rather, he returned to the maintenance department. (Tr. 39). At about 3:00 p.m., Czajkowska and Christian approached Kopec, Wilusz, and employee Stefan Koscieniak. (Tr. 40, 215). Czajkowska asked, "What are you doing here? You are fired. Go away." (Tr. 41). Christian added, "The day after all the workers individually will be assessed by the management." (Tr. 41).

Czajkowska testified that the police had not been contacted until after the employees had left and that she and Christian walked through the facility after 2:45 p.m. and discovered that there was no damage to the plant. (Tr. 182)

iv. Plant Manager Czajkowska again reiterates that she had fired the employees by telling them that they had fired themselves by continuing to strike.

On Wednesday, September 21, at around 5:00 a.m., the group of employees returned to the Bensenville facility only to discover that the locks of Respondent's facility had been changed and the facility was locked. (Tr. 43, 90, 141). After the employees waited for a couple of hours in Respondent's parking lot, management exited the building from the employee entrance, accompanied by a police officer. (Tr. 44, 91, 141). Czajkowska, Christian, Kerchenfaut, and a police officer addressed the group of employees. As the previous day, the majority of the conversation that took place was in Polish. (Tr. 45, 142). Kopec testified that he heard Czajkowska state that the grounds belonged to the factory, they were private, and that they had no right to stand there because they were fired. (Tr. 45). Ossak testified that she heard Czajkowska ask, what are you doing here, you are fired. (Tr. 142) Ossak testified that one of the employees responded to Czajkowska's statement by saying, so you did fire us, we are fired. Czajkowska's responded that they had fired themselves because they walked off the job. (Tr. 142).[8] Supervisor Ewa Kulikowski affidavit corroborates the employees' testimony, stating, "I seem to recall that there was something said about us firing ourselves." (R 15 at 2, lns 21 - 22). The employees remained in place, standing in the parking lot. Kerchenfaut, unable to speak Polish, told the employees, in English, that if they try to file unemployment, they are not going to get it because we will protest it. (Tr. 142, 326). Not seeing any voluntary movement from the employees, Kerchenfaut told the police officer to remove the employees from the property. (Tr. 143). At this point, two officers flanked the employees. (Tr. 47). One officer waved his handcuffs and confirmed, in English, that the employees cannot stay, to get off the property.[9]

[8] Czajkowska, who testified under 611(c) continued to be evasive when she was confronted with testimony that she provided in her affidavit concerning the threats that she made to the employees. Czajkowska testified at first that she could not remember threatening the employees that they fired themselves, but subsequently conceded that after she invited the employees to work she also threatened if they continued pressing their demands, "you're trying to fire yourself." (Tr. 184 – 185, 216, 218).

[9] The Police Report verifies that there was a police presence on September 21 and their purpose was to escort the employees in the group who did not return to work off of Respondent's property. There is no evidence reflected in

(Tr. 45, 92, 143, R 14).

v. Plant Manager Czajkowska unlawfully tells the employees seeking to return to work that they must re-apply for their positions. (Exception 15).

Following the police threat of arrest, the employees dispersed from Respondent's property and re-grouped on a grassy area near the street, off company property. (Tr. 48 – 49, 92). Ossak and Kopec went to the police station and received instructions on how to conduct a peaceful protest. (Tr. 49, 144). Thereafter, Ossak and Kopec returned to the group and explained their right to protest. (Tr. 144). The group remained together until about 3:00 p.m. (Tr. 49, 93, 144). The last time that the employees were addressed as a mass group by management that week was that Wednesday morning.

The employees continued to gather each morning adjacent to Respondent's property. On Friday morning, September 23, the group agreed that they should go to the National Labor Relations Board. (Tr. 94). Dziekan testified that she, as well as Beata Ossak, Bernadetta Cukier, and Alicja Probola went to the Labor Board (Tr. 95). After these individuals returned to the group and informed them of what transpired at the Labor Board, the group collectively decided to send Halina, Sebastian, Pawlo, and Dziekan to the company to ask if the company wanted the group to work. (Tr. 95).

Dziekan testified that she, Halina, Sebastian, and Pawlo went to Respondent's facility and Sebastian informed the receptionist located at the main entrance that they came to ask if the company needed them to work. (Tr. 96). After waiting for approximately ten minutes, Czajkowska came to the reception area and asked through the reception area window, what do you want. (Tr. 97). Sebastian responded and asked if they "... need us for work or you don't

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the record that the police officers who responded to the scene understood Polish and therefore the exchange between management and the employees. To this extent, the officer's remarks in the reports can not reflect an accurate account of the exchange but merely what Respondent reported to the officer.

anymore." (Tr. 97) Czajkowska told the employees that they needed to fill out applications to show their functions and positions before the company would consider bringing them back to work. (Tr. 97, 186); Exception 15. After Halina, Sebastian, Pawlo, and Dziekan returned to the assembled group and explained their exchange with Czajkowska, the group collectively agreed that they would fill out applications. (Tr. 98). However, when Halina, Sebastian, and Pawlo went back to the building to pick up applications, they returned to the main group empty-handed because the entrance doors of the Bensenville plant were now locked. (Tr. 99).

vi. Respondent failed to rescind the mass termination, continues to unlawfully reinstate twenty-two employees and admits to accelerating a transfer of production work to it Mexico facility because the employees went on strike. (Exceptions 13, 16, 17 and 18).

After Respondent's efforts to threaten and bully the employees to abandon their strike failed, the managers took a different tactic to end the strike. Czajkowska and Christian contacted the plant supervisors during the first week of the strike to encourage their return to work and instructed them to contact their employees to return to work. (R 4, Tr. 226). A number of supervisors and employees abandoned the strike and returned to work. Contrary to the ALJD, at p. 5, ln 9-12, the record as a whole does not support a finding that the supervisors had difficulty contacting employees due to employee Kopec's advice to the employees not to answer the telephone. Exception 13. Rather, the record shows that the supervisors did not contact all of the employees they supervised but instead were selective in their contacts with employees. Specifically, Supervisor Teresa Uchanska's testified that she only contacted one employee via telephone and she only met with a select group of employees on the morning September 22. (Tr. 382, 387). Moreover, Supervisor Kulikowski was contacted by Czajkowska on Wednesday evening and while Kulikowski told Czajkowska that she would return to work the following day,

Kulikowski failed to call employee Ossak because, despite Respondent not previously making contact with Ossak, Kulikowski felt that everyone should decide individually whether they should return to work. (R 15 at 3). The record does not support a finding that the supervisors had difficulty contacting employees due to any action taken by employee Kopec to interfere with Respondent interaction with employees.

On Tuesday morning, September 27, a group of about 60 employees that remained on strike assembled once again in the area adjacent to the Bensenville plant and together they approached the company's main entrance to ask if they could return to work. (Tr. 50, 101, 146). Czajkowska and Christian addressed the group. (Tr. 51, 101). Czajkowska instructed the employees to sign the unconditional offers to return to work acknowledging that their terms of employment would not change. (GC 2, Tr. 50). She told the employees that they would be considered and contacted. (Tr. 102). Czajkowska testified that the Respondent wanted the group to know that nothing was going to change in their future and so long as they agree, they could sign the form. (Tr. 235).

While signing the unconditional offer to return to work, Ossak asked President Christian how long they would have to wait to receive contact from the company. (Tr. 148). Although the ALJ wholly credited employee Ossak's testimony, the ALJ failed to find that President Christian responded that she could not give Ossak a timeline because the company was re-organizing production by moving the work to Mexico because of the strike. (Tr. 148 – 149); Exception 18. While some employees were contacted to return to work between Tuesday, September 27 and Friday, September 30, Respondent failed to reinstate twenty-two employees. (R 5).

During the course of the strike, the Respondent decided to transfer a rotary Pyrex machine and a lathe shrink down machine to its Mexico facility. (Tr. 268, 286). This equipment

had been used by the Bensenville production employees before the strike began. (Tr. 286-287). The removal of the machinery was immediately noticed by returning strikers. (Tr.150). The last time that Respondent transferred a machine to its Mexico facility was in 2009. (Tr. 284). Respondent's records show that prior to the strike, no decision had been made to transfer machinery to Mexico. (R 9, Tr. 289-290).

Plant Manager Czajkowska acknowledged that Respondent accelerated its decision to transfer the work to its Mexico facility because of the strike. (Tr. 285). In addition to the machinery that was transferred, Respondent accelerated the transfer of production work to its Mexico facility. In particular, Respondent added 9,000 units of laser lamp production to its transfer list after the strike and it produced 250 units of laser lamps.[10] (R 9, 11, 13 and Tr. 265). An additional 50 units of work was transferred in order to meet customer orders during the strike. (R 13). Respondent's records show that before the strike began, there were no fixed or definite decision that had been made to transfer machinery or production work to Mexico. (R 9).

Respondent interviewed and hired four employees off the street to start working permanently at the Bensenville plant beginning on Monday, September 26 or 27. (Tr. 187, 342, 396). Given that the start date for these four positions was on September 26 or 27, these positions should have been offered to the employees who were seeking reinstatement. Exception 17. Respondent also challenged the unemployment compensation applications for employees who were not reinstated as demonstrated by the State of Illinois Determination letter declaring that Lidia Lasoto was ineligible for benefits for the period beginning after October 2nd because she had participated in the work stoppage.[11] (GC 8); Exception 16. On October 21, Czajkowska

[10] Respondent exhibits pertaining to Respondent's product transfer lists were barely legible and the explanation given as to the content in these exhibits, even when a couple of the exhibits were legible, was often unclear and confusing. (R 8-13, Tr. 240-241).

[11] Kerchenfaut confirmed that the Respondent challenged the unemployment applications of employees. (Tr. 334).

and Christian signed letters that were sent to the twenty-two people who have yet to be reinstated. (GC 6). This letter reiterates and confirms that Respondent made good on its threat to transfer production work out of its Bensenville plant. The letter specifically references that the company is not reinstating the employees because of the work stoppage that occurred on September 20, 2011. The letter which was written in English states,

> While most, if not all of our employees offered to return to work by September 27th, based on our assessment of the economy and our continued movement of production to our plant in Mexico (which we continue to assess), we have determined we do not currently have jobs for all of our employees who offered to return to work on September 27th. (GC 6).

The letter goes on to inform the employees that they have not been terminated but were instead placed on a preferential hiring list and it asserts that they will be "recalled" before any new employees are hired. (GC 6).

B. General Counsel met its burden in demonstrating that Respondent violated Section 8(a)(1) when it threatened employees with reprisals for engaging in a protected work stoppage. (Exceptions 1, 2, 3, 4, 5, 7, 8, 10 and 12).

The Supreme Court has held that an employer is free to express any views, arguments or opinions, if the particular expression contains no threat of reprisal or promise of benefit. *NLRB v. Gisell Packing Co., Inc.*, 395 U.S. 575 (1969). While this is true, an employer must not make statements that reasonably tend to coerce or interfere with employees' Section 7 rights. *Frontier Hotel Casino,* 323 NLRB 815 (1997); *Potential School for Exceptional Children, Inc.*, 282 NLRB 1087 (1987). In subsequent cases, the Board has found that these threats are hallmark violations and are among the most flagrant of unfair labor practices. *Somerset Welding & Steel, Inc.*, 304 NLRB 32, 33 (1991), *Action Auto Stores*, 298 NLRB 875 (1990) citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (6th Cir. 1988), *Metalite Corp.*, 308 NLRB 266,

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It can be inferred that the challenged unemployment applications were not as a result of being laid-off but as a result of Respondent terminating its employees.

272 (1992). The General Counsel met its burden through the evidence presented at the hearing in this case to unquestionably show that Respondent's many threats were flagrant Section 8(a)(1) violations of the Act.

In this case, the Respondent's statements can clearly be seen to interfere with, restrain or coerce employees in the exercise of their Section 7 rights and are thus violative of Section 8(a)(1). *Farah Supermarkets*, 228 NLRB 981, 988 (1977), *Septix Waste, Inc.*, 346 NLRB 494 (2006). Respondent's unlawful independent 8(a)(1) statements were raised and fully litigated at the hearing. [12] The consistent testimony of employee witnesses Jesse Kopec, Katarzyna Dziekan and Beata Ossak established that, on September 20, President Izabela Christian and Plant Manager Anna Czajkowska threatened that things would not end well for the employees if they continued to engage in a protected concerted strike. Specifically, Czajkowska threatened that the employees would only lose and that Owner Jim Hyland would get rid of half of the employees. (Tr. 128). Czajkowska further threatened to terminate employees by throwing resignation papers on a table in front of the employees and yelling at them to sign the papers because they were fired and to go away. (Tr. 36). In response to these dire predictions, Christian buttressed the threats by stating that the owner does not care for "Polish" people like he used to and it would be so easy for the owner to move production to its other facility located in Mexico. (Tr. 85, 131-32). *Benesight, Inc., F/K/A The TPA, Inc.*, 337 NLRB 282, 283 (2001) (An employer violates Section 8(a)(1) of the Act when it threatens to discharge employees for engaging in a strike or other protected work stoppage); *Robertson Industries*, 216 NLRB 361, 368-69 (1975) (Employer unlawfully threatened to discharge employees if they engaged in a strike or other protected work stoppage). The Respondent's unlawful and flagrant statements were underscored the following

[12] On the record, the General Counsel's motion to amend the Complaint to add additional 8(a)(1) allegations was denied. (Tr. 366). In support of his decision, the ALJ noted that alleging additional 8(a)(1) allegations was "six of one, half dozen" and that it is uncessary to amend where the 8(a)(1) conduct is in the record. (Tr. 366-67).

day, when Czajkowska told the employees that they had fired themselves. (Tr. 184-185, 216, 218).

In the instant case, the ALJ wholly credited the testimony of employees Katarzyna Dziekan and Beata Ossak. ALJD p. 2, fn. 3. Notwithstanding the General Counsel's credible and consistent witness testimony, the ALJ failed to make certain findings of fact and conclusions of law, despite crediting employees Dziekan and Ossak. Specifically, the ALJ made several factual findings that Respondent threatened its employees but he did not explain why these statements were not characterized as Section 8(a)(1) violations. Exceptions 7, 8, and 10. Moreover, the ALJ omitted facts established through testimony by the credited employee Ossak. Exceptions 2, 3 and 5.

The ALJ further disregarded the collective testimony of Dziekan, Ossak and Kopec with respect to Plant Manager Czajkowska's threats that they are fired, to sign the resignation papers and to go away. Exceptions 1 and 5. The ALJ at ALJD p. 3, lns 11-12 and fn. 5, states that the record is unclear on whether Czajkowska told employees during the September 20 morning exchange to leave the plant. In noting that the record is unclear on this point, the ALJ summarized the record testimony at ALJD p. 3, fn. 5, detailing Dziekan, Ossak, and Kopec's consistent testimony. The ALJ later concludes that Christian and Czajkowska may have suggested that some or all resign. ALJD p. 7, ln 25-26. General Counsel submits that the ALJ undermines the significant testimony he summarized which clearly supports a finding that Czajkowska fired the employees, told them to sign the resignation forms and to get out of the facility. ALJD p. 3, fn. 5. Similarly, the ALJ mischaracterized the facts that involve Czajkowska throwing resignation forms onto the table. Exception 12. Czajkowska admitted that she threw resignation forms on the table situated in between Czajkowska and approximately 80 employees.

(Tr. 283-284). Czajkowska further admitted that she stated, "just sign the paper and you can go" while simultaneously slamming papers on the table in front of the employees. (GC 5, Tr. 199, 207). Clearly, while the mass of employees were addressing Czajkowska and Christian of their concerns over wages, Czajkowska blew up on the employees and told the employees to sign the resignation forms and get out of the facility.

Employee Kopec was mistakenly not credited by the ALJ with respect to his testimony that he heard Czajkowska yell that if we didn't want to return to work, we were fired, to sign the form because we are fired, go away. (Tr. 36) ALJD p. 3, fn. 5; Exception 1 and 5. Kopec's testimony with respect to this exchange is wholly consistent with Respondent's conduct that day and in the subsequent days to follow. The ALJD further omitted facts adduced at the hearing with respect to a later exchange between Kopec and management, where Czajkowska asked him and two other employees, "What are you doing here? You are fired. Go away." (Tr. 41); Exception 4 and 5. This testimony is consistent with the earlier exchange management had with the group of employees where Czajkowska told the employees that if they did not return to work they are fired, they can sign the resignation forms and get out. Kopec's testimony is also in conformity with Czajkowska's reiteration the following morning, when she told the employees that they fired themselves when they walked off the job. ALJD p. 5, ln 5-6. Nothing in the record warrants Kopec's credibility to be questioned. Kopec's testimony on cross-examination was not in contradiction with anything that he said on direct and was internally consistent with established fact. Specifically, his testimony was consistent with the Respondent's admissions and the testimony of employees' Ossak and Dziekan. Kopec was served with a subpoena ad testificandum by the General Counsel. Since Respondent has failed to reinstate Kopec, he has found new employment where he is currently gainfully employed and therefore has no economic

incentive to testify. For all the reasons proffered, Kopec's testimony should therefore be credited.

Accordingly, as fully discussed above, Counsel for the Acting General Counsel respectfully submits that the Board find Respondent violated Section 8(a)(1) of the Act its managers made the following threatening statements to its employees:

1. As referenced in Exceptions 1 and 5, by stating that the employees are fired, sign the resignation papers and go away;
2. As referenced in Exceptions 2 and 5, by stating that the employees are going to lose[13];
3. As referenced in Exceptions 3 and 5, by stating that there are companies that are moving production to Mexico, the owner has four other companies on different continents and it would be so easy to make a decision;
4. As referenced in Exceptions 4 and 5, by stating to employees that they are fired, go away;
5. As referenced in Exception 7, by stating that the owner is no longer "pro-Polish" as he once was[14];
6. As referenced in Exception 8, by stating that the owner would tell the managers to get rid of half of the employees if they continued the strike; and
7. As referenced in Exception 10, by stating that the employees fired themselves when they walked off the job.

II. Respondent Violated Section 8(a)(1) When it Terminated the Employees in Retaliation for Engaging in a Protected Work Stoppage.

[13] Plant Manager Czajkowska reaffirmed that their concerted actions will result in discharge by her implied threat that the employees would only lose if they continue their protected work stoppage.

[14] In addressing the group of employees at the onset of the work stoppage by stating that it is futile to present their grievance to the owner of the company because the owner no longer cares for its predominantly Polish employees at its Bensenville facility, together with statements that the owner can replace these employees with other workers outside the country, clearly is an implied threat of discharge statement.

A. Respondent Clearly Terminated the Employees on September 20, 2011 in Retaliation for Their Protected Work Stoppage. (Exceptions 6, 9, 11, 20, 22 and 23).

General Counsel submits that Respondent terminated its employees on the morning of September 20, 2011 because they engaged in a work stoppage to protest a longstanding wage freeze. The ALJ's failure to conclude that Respondent terminated the employees but rather concluded that Respondent engaged in a discriminatory accelerated lay-off of the twenty-two employees not recalled to work is contrary to the record evidence adduced at the hearing. Exception 22 and 23.

Significantly, Respondent did not have any plans to lay-off or terminate employees from the Bensenville plant prior to the September strike. ALJD p. 8, ln 29-31. It is illogical to conclude that Respondent accelerated a plan to lay-off employees where no plan existed in the first instance. First, the ALJ properly did not credit Respondent President Christian's weak defense justifying its failure to reinstate the twenty-two employees that just before her trip to Chicago, she and the Owner, Jim Hyland, discussed the need to lay-off employees at the Bensenville facility at some unspecified time in the future. ALJD p. 8, fn. 12. Second, the ALJ properly did not credit Respondent Vice-President of Sales and Marketing Grant Hyland's attempt to paint a bleak picture of Respondent's Bensenville plant revenues and production when the Respondent's exhibits demonstrate an opposite forecast. ALJD p. 8, ln 31-45, p. 10, ln 23-26. Specifically, the ALJ correctly evaluated Respondent's records and found that Respondent's assertions that it was overstaffed prior to the work stoppage and that it was experiencing an ongoing decrease of revenues were false, in light of its revenues, number of lamps shipped, increased overtime hours, and increased production workforce just prior to the strike. ALJD p. 9, ln 40 – 46, p. 10, ln 1-7, pg. 10, fn. 13. Third, and discussed in detail in the following section,

the ALJ discounted Respondent's attempt to show that there was little work permanently transferred to its facility in Mexico. ALJD p. 10, ln 20-23. Given that the evidence is insufficient to show that Respondent would have laid off a substantial portion of its workforce regardless of the strike, any failure to reinstate the employees is not due to an accelerated layoff but due to its unlawful transfer of work after it terminated its workforce at its Bensenville facility. Taking into consideration the record in its entirety, the record does not substantiate a conclusion that it engaged in an accelerated layoff. To the contrary, Respondent's knee-jerk reaction to the strike consisted of discriminatorily firing its employees within the first hour of the strike as a tactic to get the employees to abandon the strike.

In the instant case, the ALJ incorrectly analyzed the employees' termination under *Wright Line*. Exception 20. Under Board law, an employer violates Section 8(a)(1) of the Act when it discharges employees for engaging in a work stoppage to protest their working conditions. *Benesight, Inc., F/K/A The TPA, Inc.*, 337 NLRB 282, 283 (2001). In such cases, *Wright Line* is not an appropriate analysis, as the existence of the Section 8(a)(1) violation does not turn on the employer's motive. *Atlantic Scaffolding Co.*, 356 NLRB No. 113 (2011). The Board has found that, "on the issue of motive, ordinarily, any management action detrimental to participants in a protected work stoppage is sufficiently destructive of employee rights to be presumptively unlawful." *Cub Branch Mining, Inc.*, 300 NLRB 57, 59 (1990).

Further, the ALJ incorrectly credited the Respondent's witness' testimony that Respondent had not terminated any of its employees at all relevant periods of time. ALJD p. 8, ln 12; Exception 24. The determination of whether there was a discharge is judged not from the Respondent's viewpoint, but from the employees' perspective, and the employer is held responsible "when its statements or conduct create an uncertain situation for the affected

employees." *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001). Discharged strikers are treated as discriminates entitled to reinstatement and backpay from the time they were discharged. *Abilities and Goodwill,* 241 NLRB 27 (1979), enfd. denied 612 F.2d 6 (1st Cir. 1979), *Lyon & Ryan Ford, Inc.*, 246 NLRB 2 (1979), enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981).

There can be no dispute that on the morning of September 20, 2011, when Respondent's employees gathered in the morning to confront management about the lack of pay raises for many years, they were engaged in concerted activities that are at the heart of Section 7's protection. *Cub Branch Mining, Inc.*, supra. It is also clear that Respondent's immediate knee jerk reaction was to fire the employees for stopping work to protest the lack of pay raises. Czajkowska blew up in front of the striking employees as evidenced by her throwing resignation papers on the table situated between Czajkowska and the employees, telling the employees to sign the papers, and to get out, and by telling them they were fired. (Tr. 36, 199, 207, 283-284, R. 3, aff at 2). Thus, the employees could reasonably believe that they had been terminated. *See Kolkka Tables & Finnish-American Saunas,* supra; *Golay & Co, Inc. v. NLRB*, 371 F.2d 259, 265 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967) (enforcing the Board's order finding the work stoppage protected because the employer refused to discuss the matter and hastily discharged the workers without any warning to leave the property); *NLRB v. Ridgeway Trucking Co.*, 622 F2d 1222, 1225 (5th Cir. 1980) (enforcing the Board's order finding that the employer's conduct gave the employees a reasonable impression that they were being discharged for engaging in a protected work stoppage). That the employees could reasonably believe they had been fired is not negated by their continuing protest – at that point no other course of action was open to them. They had nothing further to lose.

Respondent's continuing conduct in response to the employees protected protest confirmed that indeed they had been fired:

1. Late on September 20, 2011, Czajkowska told employees Kopec, Wilusz, and Koscieniak that they had been fired and to go away. (Tr. 40-41); Exception 6.

2. On the morning of September 21, 2011, Czajkowska told the employees that they had fired themselves and they had to leave Respondent's property. (Tr. 142); Exception 9 and 11.

3. On Friday, September 23, 2011, a group of employees seeking to return to work were told by Czajkowska that they had to fill out new employment applications. (Tr. 96-97, 186); Exception 14.

Based on this multitude of statements and conduct by Respondent in its reaction to the employees stopping work to confront management about pay raises, any reasonable employee would assume they had been discharged and the only choice left to them was to continue to protest in hopes of recovering their jobs and perhaps getting some satisfaction to their wage demands. As discharged employees, all of the strikers are entitled normal remedies of reinstatement and backpay from the time of their discharge until they are reinstated. *Lyon & Ryan Ford, Inc.*, supra.

B. The Employees Continued Protest on September 20, 2011 in Respondent's Facility did not Lose Protection of the Act. (Exceptions 19, 21a, 21b, 21c, 22 and 23).

General Counsel excepts to the ALJ's conclusion that *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) is controlling in analyzing whether the employees work stoppage was protected. Exception 19. In this case, Respondent condoned the employees staying in the plant to protest Respondent's action by simply doing nothing to remove the employees from the plant. The work stoppage remained protected despite the employees' presence at the facility for the entirety of

their work shifts on September 20.[15] After discharging the employees and telling them to leave during the first hour of the work stoppage no manager approached the employees to tell them to leave during the remainder of their protest that day. No one called the police to remove the employees. In the absence of any positive action by the Respondent to have the employees leave the premises, the employees could reasonably believe Respondent condoned their continued presence in the plant. Respondent's action of not removing the strikers is probably best explained by Respondent's hope to get its supervisors and some employees back to work. Given Respondent's lack of affirmative action to remove the employees from its facility, it was unnecessary for the ALJ to evaluate whether the employees lost their protection under the Act under the multifactor balancing test cited in *Quietflex*. *Id.* at 1056-57.

In the alternative, if Respondent did not condone the employees continued presence in its facility, then a *Quietflex* analysis is appropriate. In this respect, the General Counsel agrees with the ALJ's application of *Quietflex*. However, the ALJ's *Quietflex* analysis is flawed because he based his analysis on a false premise that the employees were never terminated and simultaneously told to leave the facility. Exceptions 21a, 21b, 21c, 22 and 23.

As previously argued, above, the ALJ erred in failing to conclude that the employees had been terminated within the first hour of the work stoppage. To this end, the ALJ ignored Plant Manager's own admissions that she approached the employees with resignation papers, threw the papers on the table and said, "just sign the paper and you can go." The ALJ also ignored the consistent testimony of the employees, where each employee testified that Czajkowska threw the papers on the table and told them to get out. Finally, the ALJ ignored several affirmations that

[15] It is well settled Board law that "[t]he Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice." *Bethany Medical Center*, 328 NLRB 1094 (1999), citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). It is also well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions are engaged in "concerted activities" for "mutual aid or protection" within the meaning of Section 7 of the Act. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

the employees were terminated, to include Czajkowska asking employee Kopec why he was still in the facility since he had been fired and Czajkowska telling the employees the next day that they had fired themselves because they stopped working. The ALJ incorrectly found that any ambiguity raised by Respondent was cleared the following day, September 21, when Respondent stated that the employees could return to work under the same conditions. ALJD p. 7, ln 32-35; Exception 21c. The ALJ ignored the fact that during that same exchange on September 21, Plant Manager Czajkowska told the employees that they had fired themselves, thus, at the minimum, additional ambiguity as to the employees' status and whether there was any resolution to their concerns was elevated. ALJD p. 5, ln 5-6; Exception 21c. The employees were unquestionably terminated and despite staying in the facility, the in-plant work stoppage continued to be protected for all the reasons stated in the ALJD.

The fact that the employees were given an ultimatum of leaving the facility as terminated employees or to get back to work does not put the employees outside the confines of Act. In *Fortuna Enterprise*, 354 NLRB 17 (2009),[16] the employees were engaged in a protected work stoppage and after demanding to speak to senior management, the Respondent suspended 77 employees. The Board adopted the ALJ's finding that the employees were engaged in protected concerted activity at the time they were suspended and that the employees' continued presence on the Respondent's property at the time of their suspension still served an immediate protected interest. *Id.* As management had yet to hear and consider the employees' grievance, the Respondent was not yet entitled to assert its private property right. *Id.* In the instant case, the employees asked for management to present their grievance to the owner and rather than consider this request, Czajkowska and Christian instead admonished the employees by telling

[16] Remanded by Court of Appeals to assess further under the *Quietflex* multifactor balancing test because the employer had a longstanding "open door" policy, facts which are not present in the instant case.

them they would lose and that the owner doesn't care about Polish people like he used to. At no point in time did Czajkowska or Christian confirm whether they would present the employees' wage demands to the owner. Like the 77 employees in *Fortuna*, the 96 employees in the instant case were similarly retaliated against with immediate termination because they engaged in a work stoppage and likewise were not afforded any opportunity to present their grievance to Respondent owner.

The facts in *Quietflex* are distinguishable from the case at hand. In *Quietflex*, the Board found that the employees' concerted work stoppage on company property lost its protection after a reasonable period of time. A "reasonable" time being defined by all the circumstances. In *Quietflex*, the employer addressed the employees' grievances in a meaningful way and after many hours, warned the employees on two occasions to either return to work or continue the work stoppage off the employer's premises. As the employees failed to comply, the employer thereafter lawfully discharged the employees. *Quietflex,* supra at 1058-59. The instant case is distinguishable from *Quietflex* because unlike *Quietflex*, the case at hand involves Respondent's refusal to address the employee demands or to engage in any effort to resolve their grievance and the immediate termination of the employees absent any warning to first leave the facility. In this case, Respondent's employees were told that there would be no discussion of their grievance, to get to work or accept termination. In other words, a callous -take it or leave it- ultimatum was delivered by the managers in response to the employees' lawful activity. This set of facts serves to distinguish the work stoppage found in this case for those found to be unprotected in prior Board cases.[17]

[17] In *Waco, Inc.*, the Board ruled that the employees "were occupying the facility in manner which was unprotected" because they continued to occupy the employer's premises for several hours *after* they had been directed to leave if they were not returning to work and they failed at any time during the occupation to "communicate to the Respondent the particulars of their grievances so as to facilitate a discussion or possible resolution of their

Given all the factors in this case, even considering the full length of time the employees were in the Respondent's facility, the protection of the Act should not be removed from these employees because they were engaged in conduct that is fundamental to protection under Section 7 of the Act, in the face of a Respondent that neither attempted to resolve the dispute nor to remove the employees from the facility. Rather, Respondent chose to ignore the employees and their attempts to discuss their issues. Accordingly, weighing all the *Quietflex* factors clearly favors the finding that the employees retained the protection of Section 7 of the Act throughout their entire withholding of their services and peaceful presence in the plant on September 20, 2011.

III. Respondent Violated Section 8(a)(1) When it Unlawfully Transferred Machines and Production Work to from its Bensenville, Illinois Facility in Retaliation for Employees Engaging in a Protected Work Stoppage. (Exceptions 25 and 26)

In the instant case, the ALJ properly found that the Respondent accelerated a transfer of production work to Mexico because of the strike, at ALJD p. 10, ln 12-16. However, the ALJ inadvertently failed to conclude that Respondent's transfer of production work was in retaliation of the employees protected activity, in violation of Section 8(a)(1) of the Act. Exception 25.

The General Counsel submits that it has met its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), to show that Respondent's transfer of production work to Mexico was motivated by the employees protected concerted work stoppage and therefore in violation of Section 8(a)(1) of the Act. Where the evidence may support a lawful and/or unlawful motivation, *Wright Line* guides the analysis into the employer's motivation. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

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concerns." 273 NLRB 746, 746-47 (1984) (emphasis added). In *Cambro Mfg. Co.*, the Board stated that while "the employees were entitled to persist in their in-plant protest for a reasonable period of time...[there came] a point at which the Respondent was entitled to reclaim the use of its entire premises," taking into consideration that the employees had been assured the opportunity to meet with the employer's general manager, in accordance with the established past practice, under the open door policy) 312 NLRB 634, 636 (1993).

Under *Wright Line*, the General Counsel must establish that the unlawful activity was motivated at least in part by Respondent's animus to its employee's union or protected concerted activity. In this case, General Counsel established that the work stoppage was the sole motivating factor in Respondent's decision to transfer its production and machines to its Mexico facility. *Id.* at 1083. Moreover, the Board has long held that where adverse action occurs shortly after employees have engaged in protected activity, an inference of unlawful motive is raised. *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003), citing *LaGloria Oil*, 337 NLRB 1120 (2002). Once the General Counsel has established a prima facie case, Respondent has the burden of establishing that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089.

In this case, Respondent's actions conform to its managers' threats that once the owner learned about the strike, half of the employees would be gone. It also was in keeping with Respondent President's admonishment to the employees at the start of the strike that Respondent had several production facilities to which their work could be transferred, including the one in Mexico. (Tr. 131). Following these threats, in retaliation for its employees' protected strike, Respondent transferred two machines and production work to its Mexico facility. (Tr. 268, 286). The record is clear that as of September 20, the day the employees initiated the work stoppage, no decision had been made to transfer machinery to Mexico. (R. 9, Tr. 289-290). In fact, the last time Respondent moved a machine from its Bensenville facility to its Mexico facility was in 2009. (Tr. 284). It is also undisputed that Respondent accelerated its decision to transfer production to its Mexico facility because of the strike and the ALJ properly found, through Respondent's own admission, Respondent's transfer of production work was in retaliation for the

employees' engaging in the protected work stoppage.[18] (Tr. 285); ALJD p. 10, ln 12-14. The transfer of equipment and production executed the unlawful threats made on the first day of the work stoppage and cemented Respondent's message to employees that supporting each other's efforts to engage in protected, concerted activity will lead to a serious adverse employment action.[19] (Tr. 131). Given the foregoing, General Counsel met its burden under Wright Line to support the inference that the employees' protected conduct was the motivating factor in Respondent's decision to transfer machinery and production to another facility. Id.

The ALJ properly found that Respondent failed to demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. ALJD p. 10, ln 17-22. Respondent attempted to excuse its retaliatory and unlawful conduct by attempting to cast its Bensenville facility as an "incubator" facility where new products are developed and tested prior to the production work being initiated at its facility in Mexico. Respondent also takes the position that any decision it made to move machinery or production to another facility was part of Respondent's ordinary course of business. (Tr. 364). However, Respondent's records show that unless a product is earmarked for production in its Mexico plant, products were and continue to be made in its Bensenville facility. (R 9, 10, 11, 12). The evidence does not support that Bensenville is anything but one of Respondent's production plants. Respondent did not submit evidence that customer orders have changed, its costs as a whole are lower in its other facilities, or that there were any fixed or definite decisions made to

[18] Respondent added 9,000 units of laser lamps production to the transfer list and transferred 250 production units after the strike. (R. 9, 11, 12, 13, and Tr. 265).

[19] Also, on October 21, Respondent confirmed, in writing, that they made good on the threats to transfer production work from Bensenville to Mexico. Respondent's letter to the twenty-two unreinstated employees reads: "While most, if not all of our employees offered to return to work by September 27th, based on our assessment of the economy and our continued movement of production to our plant in Mexico (which we continue to assess), we have determined we do not currently have jobs for all of our employees who offered to return to work on September 27th." (GC 6).

transfer any machines or production work but for the strike.[20] Exception 26. Moreover, Respondent does not contend that the machines or production work was transferred because the strike curtailed production at the Bensenville facility.[21]

Given Respondent's egregious threats and the fact that there is no credible evidence to substantiate Respondent's fabricated "incubator" and ordinary course of business contentions, it is clear that Respondent's only motivation to transfer machines and production to the Mexico facility was solely in retaliation to the employees' protected concerted activity. As the record evidence clearly demonstrates, the strike was of short duration and there was no need to transfer production or machinery but for a purely retaliatory motive. Accordingly, in keeping with the ALJ's factual findings, General Counsel submits that Respondent's transfer of machines and production work violated Section 8(a)(1) of the Act and a conclusion of law to this effect should be made.

IV. The ALJ failed to Provide the Necessary Language Necessary in its Proposed Order to Remedy Respondent's 8(a)(1) Violations. (Exceptions 27, 28, 29, 30, 31, 32 and 33).

Counsel for Acting General Counsel respectfully submits that the evidence herein conclusively demonstrates that Respondent violated Section 8(a)(1) of the Act as alleged in the

[20] Margaret Chlipala serves as Respondent's Product Transfer Coordinator and is responsible in keeping a transfer list updated and coordinating the distribution of information and materials necessary for the Mexico plant to build existing and new product as well as the alleged ongoing efforts to transfer production work from Respondent's Bensenville facility to its Mexico facility. (Tr. 193-194, 246). Respondent failed to call Chlipala to testify at the hearing despite making a point of having her testify about the coordination of products and equipment placed on the transfer list during its opening statement. (Tr. 193-194, 238-239). General Counsel submits that based upon the records Respondent submitted at the trial, Chlipala would have substantiated that a decision had not been reached prior to the strike to transfer a substantial portion of production work to the Mexico facility such that would have justified the failure to reinstate employees. Accordingly, Respondent's failure to call this witness warrants that an adverse inference is drawn. *DMI Distribution of Delaware Ohio, Inc.*, 334 NLRB No. 59, slip op. at 5, fn. 15 (2001); see also *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 3 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988) (An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may be assumed to be favorably disposed to the party).

[21] Rather, Respondent unpersuasively and contrary to the record evidence, attempted to show that there was very little work permanently transferred to the facility in Mexico. ALJD p. 10, ln 20-22.

Complaint and fully discussed above.

The record as a whole clearly shows that Respondent's management engaged in a heated exchange with its work force on the morning of the strike by admonishing their efforts to resolve their longstanding wage freeze and threatening the employees with termination, that the boss will get rid of half of them and the work will be moved to another facility, and that the employees should resign and get out of the facility. For all these reasons and for all the reasons fully discussed above, the ALJ inadvertently failed to order Respondent to cease and desist from engaging in this type of conduct in retaliation for the employees' engaging in protected concerted activity. Exceptions 30 and 31.

The General Counsel submits that it has met its burden to show that Respondent violated Section 8(a)(1) of the Act on September 20 by terminating all of its employees because they initiated a protected concerted strike. They are therefore entitled to reinstatement and backpay from the time they were discharged. *Lyon & Ryan Ford, Inc.*, 246 NLRB 2, enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981). With respect to the employees that Respondent reinstated since their termination, the make-whole remedy should encompass the time period between the date they were terminated, September 20, and tolled upon the employees' reinstatement date. Exception 28.

With respect to the remaining 22 employees that Respondent continues to unlawfully refuse reinstatement, the ALJ properly provided that these strikers be made whole.[22] However,

[22] Despite the fact that the employees in the instant case were under no obligation to make unconditional offers to return to work, the employees nevertheless did on September 27. Regardless of when the unconditional offers to return to work were made, Respondent's backpay obligation triggered from the date of their unlawful discharge, September 20. *See Pride Ambulance Co.*, 356 NLRB No. 128, slip op. at 6 (2011), citing *Abilities and Goodwill Ass'n of Prof'l Employees*, 241 NLRB 27, 28 (1979), enfd. denied 612 F.2d 6 (1st Cir. 1979) ("When discharged strikers withhold their services after the date of the unlawful discharge, one cannot really be certain whether their continuing refusal to work is voluntary, i.e., a result of the strike, or whether the reason for not making application for reinstatement is that the employer, by discharging the employees, has unmistakenly impressed on them the futility of making such an application. Thus, it becomes difficult, if not impossible, to determine whether the

the ALJ incorrectly concluded that backpay shall toll for any period after September 20, 2011 for which Respondent may prove at a compliance proceeding that it would have laid off these twenty-two individuals for legitimate nondiscriminatory economic reasons. Thus, the ALJ gives Respondent a "second bite of the apple" to prove an economic justification that Respondent fully litigated and which the ALJ discredited. Exception 27. Respondents unsubstantiated defense that it laid-off, as oppose to terminated the employees, was fully litigated at the hearing held before the ALJ. Specifically, the Respondent presented its economic defense by providing records with respect to its employee complement, overtime hours, products shipped, and revenues for all relevant periods of time. The ALJ did not credit Respondent's witnesses and their attempt to support its economic defense because Respondent's records painted a different picture than the one its witnesses asserted. The Respondent was given full opportunity to present its defense at the hearing and it did so, albeit that it failed to be persuasive in showing that its actions were nothing short of terminating its employees in retaliation for engaging in the protected strike. For the same reasons, the General Counsel respectfully submits that the Board provide a remedy that Respondent restore the production work at Respondent's Bensenville facility in the manner that the production work was allocated prior to the strike.[23] Exception 29.

The ALJ's proposed Notice to Employees is also inconsistent with his conclusion that the employees were not terminated on September 20. ALJD Appendix; Exception 32. The ALJ Notice to Employees is more in keeping with the position of the General Counsel, as it refers to

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employees would have continued to strike and, if so, for how long, had the opportunity to return to work been available.") (Internal quotes omitted).

[23] In its opening statement Respondent argues that *Darlington Manufacturing Co. v NLRB*, 380 U.S. 263 (1965) precludes restoration remedies in 8(a)(1) cases. Counsel for the Acting General Counsel submits that *Darlington* is inapplicable in this matter because this case does not involve a plant closure such as was found in the *Darlington* case. Moreover, the Board has approved restoration remedies in 8(a)(1) cases, including cases involving the closure of a facility. *See Cub Mining*, 300 NLRB 57 (1990). Accordingly, an appropriate remedy in this case would include the restoration of any production work that has been transferred from the Bensenville facility to the facility in Mexico.

Respondent's unlawful discharge of employees for engaging in concerted activity for mutual aide and protection, such as a strike for higher wages. Accordingly, the General Counsel respectfully attached hereto a proposed Notice to Employees. Attachment A.

Finally, the General Counsel submits that given the nature of the violations and given the employees' limited understanding of the English language, the ALJ should have ordered Respondent to read the Notice to Employees by Respondent's President Izabella Christian or, at the Respondent's options, by a Board agent in Christian's presence, with translation available for Polish-speaking employees. Exception 33.

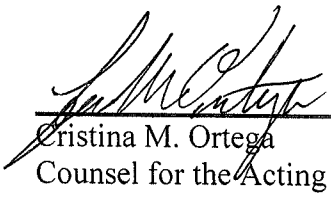
In addition to the above, Counsel for the Acting General Counsel requests the Board to include any other remedies deemed appropriate.

V. Conclusion

For all the reasons stated above, the General Counsel respectfully requests the Board find merit to its Exceptions to the Decision of the ALJ in this case and enter an appropriate Case and Desist Order and Remedy for the unfair labor practices Respondent committed.

Dated at Chicago, Illinois, this 2nd day of May 2012.

Respectfully submitted,



electronically filed

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Attachment A

Proposed Notice
Case 13-CA-065271

WE WILL NOT tell our employees, in retaliation for engaging in a protected concerted strike, that you are fired, you fired yourself, resign, your work can easily be transferred to our Mexico facility and we can get rid of half of you, you will lose.

WE WILL NOT threaten you with other unspecified reprisal if you engage in activity with other employees regarding your wages, hours, and working conditions.

YOU HAVE THE RIGHT to freely bring wage issues and complaints to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT fire employees or transfer production work and equipment to our facility in Mexico because employees exercise their right to bring issues and complaints to us on behalf of themselves and other employees or because they engage in a concerted work stoppage in support of bringing their wage issues to the attention of management.

WE WILL offer Hanna Dulian, Alicja Probola, Elzbieta Rosa, Aldona Skubik, Anna Ziemba, Sebastian Kepa, Malgorzata Kopec, Lidia Lasota, Jozef Wolski, Zofia Seroczynska, Zofia Bialon, Krystyna Boruta, Elzbieta Fiolkowska-Kaja, Renata Jurkiewicz, Elzbieta Michniowska, Maria Jablonska, Lidia Kwiatkowska, Josefa Newiarowska, Teresa Rorata, Bernadetta Cukier, Zofia Zawojski and Zdislaw Kopec their jobs back along with their seniority and all other rights or privileges and **WE WILL** reimburse them for the wages and benefits they lost from the time they were fired until they returned to work.

WE WILL pay all of the employees who engaged in a concerted work stoppage for the wages and other benefits they lost from the time we fired them until they returned to work.

WE WILL remove from our files all references to the discharge of all of the employees engaged in the concerted work stoppage that we discharged and **WE WILL** notify them in writing that this has been done and that the discharge will not be used against them in any way.

WE WILL restore our operations as they existed on the date the employees were fired.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.